

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DEC 21 2000

PATRICK FISHER
Clerk

GENARO GARAY; EVA GARAY,
parents and heirs of Nicolas Garay,
deceased; ANN CASE, personal
representative and administrator of
the estate of Nicolas Garay, deceased,

Plaintiffs-Appellants,

v.

MISSOURI PACIFIC RAILROAD
COMPANY, a corporation; UNION
PACIFIC RAILROAD COMPANY,
a corporation; TRINITY
INDUSTRIES, INC., individually
and as successor to Pullman-Standard,
Inc.; JOHN DOE CORPORATION,
INC., unknown manufacturers,

Defendants-Appellees,

and

FMC CORPORATION,

Defendant.

No. 99-3364
(D.C. No. 96-CV-1127)
(D. Kan.)

ORDER AND JUDGMENT *

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Before **BRORBY** , **KELLY** , and **LUCERO** , Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Plaintiffs appeal from two rulings of the district court following a jury's award of damages to plaintiffs on their products liability claim: the grant of judgment as a matter of law to defendants and the denial of plaintiffs' subsequent motion for new trial. Our jurisdiction over this appeal arises from 28 U.S.C. § 1291. Our review of the district court's order granting judgment as a matter of law is de novo. *Cadena v. Pacesetter Corp.* , 224 F.3d 1203, 1208 (10th Cir. 2000). We review the denial of plaintiffs' motion for new trial under a more deferential standard, abuse of discretion. *Webb v. ABF Freight Sys., Inc.* , 155 F.3d 1230, 1246 (10th Cir. 1998).

The underlying facts and procedural history are familiar to the parties and we need not repeat them here. After careful review of the record on appeal in light of the parties' arguments, the applicable law, and the standards of review, we conclude that the district court properly granted judgment as a matter of law to defendants and that its denial of plaintiffs' motion for new trial was not an

abuse of its discretion. Plaintiffs' arguments to the contrary lack merit. We decline to review those arguments not presented to the district court. *See Smith v. Rogers Galvanizing Co.*, 128 F.3d 1380, 1386 (10th Cir. 1997).¹

Therefore, for substantially the same reasons as contained in the district court's orders dated August 26, 1999, and October 29, 1999, the judgment of the United States District Court for the District of Kansas is AFFIRMED.

Entered for the Court

Wade Brorby
Circuit Judge

¹ These arguments include: 1) invocation of a rebuttable presumption under Kansas law that warnings will be read and heeded; 2) an assertion that plaintiffs had no obligation to come forward with certain factual evidence until defendants presented their case including alternative defenses; and 3) plaintiffs' contention that the jury was properly instructed not to speculate in reaching its verdict.